LIBRARY
SUPREME COURT

Supreme Court, U. S.
FILED
DEC 19 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-811

SELB MANUFACTURING COMPANY, a Division of Western, Inc., a Corporation,

and

MARIE M. BASS, Administratrix of the Estate of Harry C. Bass, Jr., Deceased,
Petitioners,

vs.

GENERAL DYNAMICS CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS L. CROFT
JOHN R. McFARLAND
411 North Seventh Street
St. Louis, Missouri 63101
314-621-8575
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Reasons for denying the writ 2

Cases Cited

De Vita v. Sills, 422 F.2d 1172 (C.A. 3, 1970) 4

Gardner v. Broderick, 392 U.S. 273 (1968) 3

Garrity v. New Jersey, 385 U.S. 493 (1967) 3

Gordon v. Federal Deposit Ins. Corp., 427 F.2d 578 (C.A. D.C. 1970) 4

Hakim v. California Superior Court, No. 73-417, November 20, 1973 (42 L.W. 3306) 4

Heligman v. United States, 407 F.2d 448 (C.A. 8, 1969), cert. den. 375 U.S. 997 (1969) 2

Hoffman v. United States, 341 U.S. 479 (1951) 2

Lefkowitz v. Turley, No. 72-331, 42 L.W. 4009 (1973).. 4

Rogers v. United States, 340 U.S. 367 (1951) 2

Spevack v. Klein, 385 U.S. 511 (1967) 3

Societe Internationale v. Rogers, 357 U.S. 197 (1958)...2-3, 5

United States v. Kordel, 397 U.S. 1 (1970) 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-811

SELB MANUFACTURING COMPANY, a Division of Western, Inc., a Corporation,

and

MARIE M. BASS, Administratrix of the Estate of Harry C. Bass, Jr., Deceased,
Petitioners,

vs.

GENERAL DYNAMICS CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For the convenience of Court and counsel, respondent, General Dynamics Corporation, will state its reasons for denying the Writ in the same order as petitioners stated their reasons for granting the Writ.

REASONS FOR DENYING THE WRIT

1 and 2. Bass' Privilege Against Self-Incrimination Was Not Violated by the Imposition of the Sanction of Dismissal of His Counterclaim and the Striking of His Affirmative Defenses and the Denial of Defendant's Motion for Continuance Was Not an Abuse of Discretion and Did Not Violate the Fifth Amendment.

The Court of Appeals correctly held that the trial court did not abuse its discretion in dismissing Bass' counterclaim and in striking his affirmative defenses (Pet. A 18) because (1) Bass made a blanket refusal to answer all interrogatories and thereby did not properly assert his Fifth Amendment privilege even though he was given two opportunities to do so (See e.g. **Heligman v. United States,** 407 F.2d 448, 450-451 (C.A. 8, 1969) cert. den. 375 U.S. 997 (1969); **Hoffman v. United States,** 341 U.S. 479, 486 (1951); and **Rogers v. United States,** 340 U.S. 367, 374 (1951)); (2) Bass didn't attempt to answer questions which he obviously could have answered without danger of self-incrimination; and (3) Bass voluntarily sought affirmative relief and was attempting to use his Fifth Amendment privilege as a "sword".

The Court of Appeals correctly held the trial court did not abuse its discretion in denying Bass' application for protective order delaying the trial indefinitely until after the completion of the related criminal case (Pet. A 9) because (1) on balance the potential injustice of an indefinite delay to General Dynamics outweighed the potential injustice to Bass of making a choice between testifying in the civil trial and remaining silent especially since another alternative was available but not requested by Bass; and (2) Bass was unharmed because he is now deceased and wouldn't be available to testify even if the case were retried.

Petitioners have made a somewhat strained attempt to bring the instant case within this Court's opinions in **Societe Internationale**

v. Rogers, 357 U.S. 197 (1958); **Garrity v. New Jersey,** 385 U.S. 493 (1967); **Spevack v. Klein,** 385 U.S. 511 (1967) and **Gardner v. Broderick,** 392 U.S. 273 (1968). But these cases are all clearly distinguishable from the instant case.

In **Societe,** *supra*, the plaintiff sued for recovery of property confiscated under the Trading of the Enemy Act. His complaint was dismissed because he failed to produce certain documents. This Court reversed because compliance with the trial court's order would have required plaintiff to commit a crime under Swiss law. The case is clearly distinguishable from the instant case on three basic grounds: (1) in **Societe** the plaintiff was prevented from answering by a legal disability but in the instant case Bass had the legal capacity to answer; (2) in **Societe** the plaintiff had made extensive efforts to comply with the trial court's order but in the instant case Bass did not make any effort to comply with the trial court's order; (3) in **Societe** because of the nature of the action, the plaintiff was in a purely defensive position, but in the instant case Bass was seeking "affirmative relief". (*Id.* at 210-211). Further, in summarizing the holding in **Societe,** Petitioners state:

> "It was there held that dismissal is too severe a penalty for failure to comply with a discovery order **unless the failure is attendant with willfulness, bad faith or fault."** (Pet. 6). (Emphasis added).

But here, the Court of Appeals concluded that Bass was guilty of fault, willfulness or bad faith. The Court stated:

> "In the final analysis we are convinced that Bass' noncompliance constituted the 'fault', 'willfulness' or 'bad faith' required to justify the dismissal of his counterclaim and the striking of his affirmative defenses. See **Societe Internationale v. Rogers,** *supra*, 357 U.S. 197, 212, 78 Sup. Ct. 1087, 1096 (1958)." (Pet. A 14).

The **Garrity, Spevack** and **Gardner** cases are all distinguishable from the instant case because those cases all involved one

who was in a purely defensive posture. The privilege invoking party in those cases was not seeking affirmative relief as Bass was in the instant case.

The case of **Lefkowitz v. Turley,** No. 72-331, 42 L.W. 4009 (1973) which was decided by this Court on November 19, 1973 and therefore not cited by Petitioners is distinguishable for the same reason as **Garrity, Spevack** and **Gardner.** This Court apparently recognized the validity of this distinction when it denied certiorari in **Hakim v. California Superior Court,** No. 73-417, on November 20, 1973. (42 L.W. 3306). The **Hakim** case involved a plaintiff whose action was dismissed because he refused to answer on grounds of privilege against incrimination certain deposition questions relevant to the subject matter of the complaint, and presented the questions of whether the order compelling the plaintiff to answer the deposition questions or forfeit property rights was unconstitutional compulsion under the Fifth Amendment, and whether the imposition of the sanction of dismissal of the plaintiff's complaint because of the plaintiff's invocation of his privilege against self-incrimination violated the Fifth Amendment. (42 L.W. 3205).

Petitioners contend also that the holding of the Court of Appeals in the instant case is in conflict with the holdings in **De Vita v. Sills,** 422 F.2d 1172 (C.A. 3, 1970), and **Gordon v. Federal Deposit Ins. Corp.,** 427 F.2d 578 (C.A. D.C. 1970). But, such conflict does not exist. Those courts recognized that the fact that one was being prosecuted in a related criminal case is not sufficient by itself to require the issuance of a protective order and that the Court must consider the effects of a stay or continuance on the other party. **Gordon,** *supra* at 580; **De Vita,** *supra* at 1178. See also **United States v. Kordel,** 397 U.S. 1 (1970). The Court of Appeals recognized in the instant case that the trial court correctly weighed the potential injustice to General Dynamics of an indefinite delay. (Pet. A 17).

3. The Dismissal of Selb's Counterclaims and the Striking of Its Affirmative Defenses Was Not an Abuse of Discretion by the Trial Court.

The Court of Appeals correctly held that the trial court did not abuse its discretion in dismissing Selb's counterclaims and in striking its affirmative defenses because the corporate officer who answered the interrogatories, Raymond N. Frey, did not provide "such information as (was) available to (Selb)" as required by Federal Rule of Civil Procedure 33(a) (Pet. A 6—A 8) and because Selb's refusal to answer would have worked an extreme injustice on General Dynamics by requiring the latter to defend against the multi-million dollar counterclaim and respond to certain affirmative defenses without the benefit of discovery. (Pet. A 9).

Selb's reliance upon **United States v. Kordel,** 397 U.S. 1 (1970) is misplaced. There, this Court hypothesized a situation in which no one could answer interrogatories addressed to a corporation without subjecting himself to the risk of self-incrimination. (*Id.* at 8-9). Here, there was someone available to answer the interrogatories—Raymond N. Frey, Secretary of the corporation. He simply did not supply all the information available to the corporation as required by Rule 33(a).

The only other case cited by petitioner on this point is **Societe Internationale,** *supra.* But, that case is completely distinguishable from this one for the reasons previously asserted in this Brief.

4. The Court Below Correctly Applied Applicable State Law.

The Court of Appeals held (Pet. A 18-20) that the trial court followed the proper procedure in looking at the allegations of the complaint to determine that it was an action in tort for

fraud, properly applied the Conflict of Laws rule of Missouri to recognize Texas substantive law to be applicable, correctly interpreted Texas substantive law as giving rise to the action in tort, and properly held that the application of the Texas law would not contravene the public policy of Missouri.

It is submitted that Petitioners herein, who were convicted criminally for the same acts for which they were here sued, were given a fair trial and appeal and that the Petition for Certiorari should be denied.

Respectfully submitted,

THOMAS L. CROFT
JOHN R. McFARLAND
411 North Seventh Street
St. Louis, Missouri 63101
621-8575
Attorneys for Respondent